08-2572-cr

To Be Argued By:
PAUL A. MURPHY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-2572-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

RODOLFO SEGURA, also known as Rodalfo, also known as Rudolfo, also known as Rudalfo, also known as Rudy, JOSE ORLANDO PENA, CIELO MELENDEZ,

(For continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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NORA R. DANNEHY
Acting United States Attorney
District of Connecticut

PAUL A. MURPHY
SANDRA S. GLOVER
Assistant United States Attorneys

JOHN E. ELEJALDE, also known as Juancito, MARTIN TORRES, ROBERT VADAS, also known as Bahama Bob, CARLOS DAVILA, also known as Superman, also known as Sup, WILLIAM LOPEZ, also known as Willie, OSWALDO RODRIGUEZ, also known as Ozzie, EVETTE RODRIGUEZ, THOMAS SMALLS, DANIEL MARRA, RICHARD TREGLIA, JOSEPH CAPPELLIERI, also known as Mr. Joe, OSCAR FLORES, SHAKI SUMPTER, NORRIS SANDERS, also known as Chucky, JAMES W. WILLIAMS, ANGEL RODRIGUEZ, also known as Gago, JOSE FIGUEROA, also known as Gilligan, JOSELITO ROTGER, also known as Flathead, OSCAR FIGUEROA, also known as Shocker, JUANITA FIGUEROA, NOEL RODRIGUEZ, also known as Chicano, LELA ALI, MALVIN MARQUEZ, also known as Big Pun, VAN TURNER, JEFFREY NAVARRO, also known as Goonie, REGINALD JOSEPH, also known as Bama, PAUL IANNACONE, also known as Nick, HECTOR BARRIENTOS, also known as The Uncle, JIMMY AUGUSTO RESTREPO, also known as Jimmy, MARTHA COLLAZO TORRES, OCTAVIO TABORDA, NORMAN ARRANGO RAMIREZ, CARLOS BOLANOS YUSTY,

Defendants,

WILLIAM LOPEZ,

Defendant-Appellant.

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STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. §§ 3231 and 3582(c)(2). The district court granted in part and denied in part the defendant's motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) in an order entered May 15, 2008. Joint Appendix 22. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on May 22, 2008.[1]

This Court has jurisdiction over an appeal of a final order denying a § 3582(c)(2) motion, although it has never determined whether that authority stems from 28 U.S.C. § 1291, 18 U.S.C. § 3742(a), or both. *See, e.g.*, *United States v. Chavez-Salais*, 337 F.3d 1170, 1171-72 (10th Cir. 2003) (holding that § 1291 provides jurisdiction over appeal of denial of § 3582(c)(2) motion); *United States v. Edwards*, 309 F.3d 110, 112 (3d Cir. 2002) (per curiam) (holding that jurisdiction is provided by both § 1291 and § 3742); *United States v. Legree*, 205 F.3d 724 (4th Cir. 2000) (holding that jurisdiction is provided by § 3742(a)(1)); *United States v. Lowe*, 136 F.3d 1231, 1232 (9th Cir. 1998) (evaluating appellate jurisdiction under § 3742(a); holding court lacked appellate jurisdiction to review discretionary denial of § 3582(c)(2) motion); *United States v. Aguilar-Ayala*, 120 F.3d 176 (9th Cir. 1997) (holding that court has jurisdiction to review denial of § 3582(c)(2) motion under § 1291).

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[1] The docket apparently erroneously shows the notice of appeal as filed May 2, 2008.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the statutory directive in 18 U.S.C. § 3582(c)(2) limiting the extent of a sentence reduction to that which is permitted by the policy statements issued by the Sentencing Commission must be considered advisory in light of *United States v. Booker*, 543 U.S. 220 (2005).

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-2572-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

WILLIAM LOPEZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This appeal arises out of a motion filed by the defendant, William Lopez, to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) based on the amendments to the Sentencing Guidelines reducing the applicable base offense levels for cocaine base ("crack") offenses. The district court granted the defendant's motion in part and reduced his sentence of imprisonment from 292 months to 262 months. The reduction represented a change from the

bottom of the guideline range that applied at the time of sentencing, to the bottom of the amended guideline range.

But the district court rejected the defendant's further contention that the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), authorizes a sentencing court to re-examine its entire sentence, unbounded by the limitations the Guidelines place on the extent of a sentence reduction under § 3582(c)(2). Instead, the district court held that the extent of any sentencing reduction was restricted to that which is "consistent with applicable policy statements issued by the Sentencing Commission," pursuant to the plain language of § 3582(c)(2). The district court recognized that the Sentencing Commission's policy statements expressly limited the extent of any sentence reduction to a sentence within the amended guideline range. *See* U.S.S.G. § 1B1.10(b)(1) & (2).

The defendant contends here, as he did in the district court, that such a limitation based on the policy statements of the Sentencing Commission violates the central holding of *Booker*, to the effect that the Guidelines are advisory, not mandatory. This Court should reject the defendant's arguments and affirm the district court. Nothing in the Supreme Court's holdings in *Booker* or its progeny, including *Kimbrough v. United States*, 128 S. Ct. 558 (2007), changes the statutory directive in § 3582(c)(2) limiting the extent to which a sentencing court may reduce an otherwise final sentence. The Sixth Amendment rationale underlying *Booker* – which reflected the unconstitutionality of exposing a defendant to an

increased maximum sentence based on judicial factfinding – does not apply to a § 3582(c)(2) motion, as the latter authorizes only a sentence *reduction*.

Statement of the Case

On May 6, 1999, a federal grand jury sitting in Bridgeport, Connecticut, returned an indictment charging the defendant and numerous others with various offenses relating to a drug-trafficking operation run out of Norwalk, Connecticut. Joint Appendix 6 ("J.A. __."). The case was assigned to the Honorable Ellen Bree Burns, United States District Judge for the U.S. District Court, District of Connecticut.

On April 3, 2001, the defendant pled guilty to one count of conspiracy to possess with intent to distribute 50 grams or more of cocaine base and five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. J.A. 17, 102.[2] On November 7, 2001, the defendant was sentenced principally to 292 months' incarceration. J.A. 18. The defendant thereafter filed a notice of appeal, and this Court eventually dismissed the appeal. J.A. 18, 20-21.

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[2] The defendant filed a Joint Appendix and the Presentence Report ("PSR") with his brief. The PSR was filed under seal and separate from the Joint Appendix. The Joint Appendix and the PSR have been numbered so the page numbers run consecutively, beginning with the Joint Appendix. All references herein to either the Joint Appendix or the PSR will be to "J.A. __."

On April 17, 2008, the defendant filed a motion for a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2), based on the recent amendments to the drug quantity tables in the Sentencing Guidelines as applied to crack offenses. J.A. 21. The district court granted the motion in part and denied it in part in two separate orders filed on May 9, 2008, which were entered in the district court's docket on May 15, 2008. J.A. 22, 96-98. The defendant filed a notice of appeal on May 22, 2008. J.A. 99.

The defendant is currently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

The defendant was charged in a multi-defendant case targeting drug-trafficking in Norwalk, Connecticut. The defendant was an established narcotics distributor in Norwalk, Connecticut, having been involved in distributing drugs since the late 1980s. *See* J.A. 102-103. The defendant was a long-time associate of an individual named Carlos Davila, another established narcotics dealer involved in the distribution of cocaine and cocaine base in Norwalk. J.A. 102-03. From 1998 up to May 25, 1999, Rodolfo Segura supplied kilogram quantities of cocaine to Lopez, Davila and others. J.A. 102-03. Lopez and Davila, in turn, ran drug operations in South Norwalk through which they distributed substantial quantities of cocaine base to street-level dealers for further distribution. J.A. 103-04.

On April 3, 2001, the defendant pled guilty to one count of conspiracy to possess with intent to distribute 50 grams or more of cocaine base and five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. J.A. 17, 102. As a result, the defendant faced a mandatory minimum term of imprisonment of 10 years, with a maximum of life. 21 U.S.C. § 841(b)(1)(A). In the plea agreement, the parties stipulated that 1.5 kilograms or more of cocaine base was attributable to the defendant, resulting in a base offense level 38 under the drug quantity table in U.S.S.G. § 2D1.1. J.A. 118.

The defendant was a career offender under U.S.S.G. § 4B1.1. Under that provision, the base offense level would be the higher of 37 – which corresponds to a statutory maximum of life in prison – or the base offense level otherwise applicable, which in this case was 38. *See* U.S.S.G. § 4B1.1(b). Accordingly, the applicable base offense level here was 38. J.A. 104-105.

At sentencing, the defendant's counsel agreed that he was a career offender. J.A. 56. The district court rejected the defendant's request for a downward departure on the ground that his criminal history was overstated, noting that the category VI determination in this case was "absolutely appropriate." J.A. 86. As such, the resulting guideline range was 292 to 365 months' imprisonment. J.A. 83. The district court then sentenced the defendant to the bottom of the range – 292 months. J.A. 88, 92.

On April 17, 2008, the defendant filed a motion for reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2).

J.A. 21. The motion sought a two-level reduction in the guideline range based on the amendments to the Sentencing Guidelines reducing the offense level in the drug quantity tables for crack offenses. The motion also requested a full resentencing in light of *Booker*. J.A. 94.

The amended Guidelines resulted in the defendant's base offense level from the drug quantity table being reduced two levels from level 38 to 36. However, because he was a career offender, if his base offense level as calculated based on the drug quantity had been 36 at the time of sentencing, then the offense level 37 from the career offender table would have been the greater offense level and therefore would have applied. As a result, the guideline range would have been 262 to 327.

On May 9, 2008, the district court granted in part and denied in part the defendant's motion. Specifically, the district court recalculated the defendant's guideline range using the amended Guidelines and concluded that a one-level reduction in the range to 262 to 327 was appropriate. J.A. 96-98. The district court then reduced the defendant's sentence to 262 months.[3] J.A. 98. But the district court

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[3] The defendant does not take issue on this appeal with the court's calculation of the amended guideline range based on the amendments to the crack guidelines. Nor does he contend that, under the Guidelines, he was entitled to a two-level reduction, rather than a one-level reduction. His argument on appeal is limited to his claim that *Booker* required the district court to treat the Guidelines as advisory and resentence him (continued...)

denied the defendant's request for a full resentencing in light of *Booker*. The district court concluded that the extent of any reduction under § 3582(c)(2) was limited to the extent of the amendments set forth in the Guidelines. J.A. 96-97.

SUMMARY OF ARGUMENT

The district court correctly concluded that it had no authority to modify the defendant's sentence below the bottom of the amended guideline range, notwithstanding *Booker*. Courts lack authority to modify an otherwise final sentence absent specific authorization. Congress authorized a narrow exception to this finality rule in 18 U.S.C. § 3582(c)(2), permitting a sentence reduction where the term of imprisonment was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." The statute is clear, though, that any such reduction in sentence must be consistent with the policy statements issued by the Sentencing Commission. The Sentencing Commission, in turn, adopted a policy statement implementing this authority and providing that, with one exception not applicable here, the extent of any sentence reduction is limited and shall not be "less than the minimum of the amended guideline range" as determined by the district court. U.S.S.G. § 1B1.10(b)(2)(A).

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[3] (...continued)
solely in light of the sentencing factors in 18 U.S.C. § 3553(a).

The Sixth Amendment does not render advisory this Congressional mandate that courts must follow the Guidelines in the context of a § 3582(c)(2) motion. The holding in *Booker* was based on the conclusion that a Sixth Amendment violation occurs where a district court finds facts that *increase* a defendant's statutory maximum sentence. That rationale does not apply to a § 3582(c)(2) motion because a district court may only *reduce* a defendant's sentence in that circumstance.

The defendant's argument that the mandatory application of the Guidelines in the context of a sentence reduction violates *Booker* is foreclosed by this Court's prior decisions dealing with sentence reductions in the context of 18 U.S.C. § 3553(f). This Court has held, post-*Booker*, that Congress may constitutionally require courts to apply the Guidelines in determining whether a defendant is eligible for safety valve relief from a mandatory minimum sentence under 18 U.S.C. § 3553(f). *See United States v. Holguin*, 436 F.3d 111, 115-17 (2d Cir.), *cert. denied*, 547 U.S. 1185 (2006). This holding is equally applicable here.

A few courts have concluded that *Booker* applies in the context of a § 3582(c)(2) proceeding, but those cases fail to appreciate the fundamental limitations of the central holding of *Booker*. Indeed, the vast majority of cases to have considered this issue recognize that *Booker* does not apply in this context.

If this Court were to agree with the minority view, the finality rule applicable to sentences would likely be

swallowed by the exception in § 3582(c)(2). If the Guidelines must be considered advisory in the context of a § 3582(c)(2) motion, then the Sentencing Commission's exclusive authority to decide when to apply an amended Guideline retroactively also logically would have to be considered advisory. In that case, each district court would be left to decide for itself whether to apply an amended Guideline retroactively, regardless of whether the Commission had decided to do so or not. Surely this was not what Congress – or the *Booker* Court – intended. Because there is nothing unconstitutional about Congress's grant of authority to the Commission to make these decisions, they must be respected.

ARGUMENT

I. The district court correctly held that section 3582(c)(2) did not entitle the defendant to a complete resentencing under *Booker*.

The defendant's sole contention on appeal is that the district court erred by treating the Guidelines amendments applicable to crack offenses and the policy statements implementing them as mandatory. Brief of Appellant at 9-13 ("App. Br. __."). As he did in the district court, the defendant contends that *Booker* required the district court to treat the Guidelines as advisory on his § 3582(c)(2) motion, and that the district court misapprehended its authority when it decided that the extent of any sentencing reduction was limited by the Guidelines policy statements. This argument is meritless and should be rejected.

A. Governing law and standard of review

1. Section 3582(c)(2) and the amended crack guidelines

"A district court may not generally modify a term of imprisonment once it has been imposed." *Cortorreal v. United States*, 486 F.3d 742, 744 (2d Cir. 2007). Indeed, this Court has noted that "Congress has imposed stringent limitations on the authority of courts to modify sentences, and courts must abide by those strict confines." *United States v. Thomas*, 135 F.3d 873, 876 (2d Cir. 1998). This has been characterized as a jurisdictional limitation on the power of federal courts. *See United States v. Regalado*, 518 F.3d 143, 150-51 (2d Cir. 2008) (noting in dicta that § 3582(c)(2) gives district courts jurisdiction to modify a sentence).

One limited exception to the rule prohibiting district courts from modifying a final sentence is in 18 U.S.C. § 3582(c)(2), which provides:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with

applicable policy statements issued by the Sentencing Commission.

In § 1B1.10 of the Guidelines, the Sentencing Commission has identified the amendments which may be applied retroactively pursuant to this authority, and articulated the proper procedure for implementing the amendment in a concluded case.

Section 1B1.10 is based on 18 U.S.C. § 3582(c)(2), and also implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

On December 11, 2007, the Commission issued a revised version of § 1B1.10, which emphasizes the limited nature of relief available under 18 U.S.C. § 3582(c). *See* U.S.S.G. App. C, Amend. 712.

Revised § 1B1.10(a), which became effective on March 3, 2008, provides, in relevant part:

(a) *Authority*. –

(1) *In General*.– In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has

subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) *Exclusions*.– A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if–

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) *Limitation*.– Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

U.S.S.G. § 1B1.10(a).

Section 1B1.10(b) sets forth procedures for deciding whether a sentence reduction is appropriate and limits the extent of any departure based on a guideline amendment that applies retroactively. Section 1B1.10(b)(2), for instance, provides that, with one exception not applicable here, "the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is *less than the minimum of the amended guideline range* determined under subdivision (1)." U.S.S.G. § 1B1.10(b)(2)(A) (emphasis added).

The amendment in question in this matter is Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack offenses.[4]

In Amendment 706, the Commission generally reduced by two levels the offense levels applicable to crack cocaine offenses. The Commission reasoned that, putting aside its stated criticism of the 100:1 ratio applied by Congress to powder cocaine and crack cocaine offenses in setting statutory mandatory minimum penalties, the Commission could respect those mandatory penalties while still reducing the offense levels for crack offenses. *See* U.S.S.G., Supplement to App. C, Amend. 706.

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[4] Amendment 706 was further amended in the technical and conforming amendments set forth in Amendment 711, also effective November 1, 2007.

The final result of the amendment is a reduction of two levels for each of the ranges set in the Guidelines for crack offenses. At the high end, the guideline previously applied offense level 38 to any quantity of crack of 1.5 kilograms or more. That offense level now applies to a quantity of 4.5 kilograms or more; a quantity of at least 1.5 kilograms but less than 4.5 kilograms falls in offense level 36. At the low end, the guideline previously assigned level 12 to a quantity of less than 250 milligrams. That offense level now applies to a quantity of less than 500 milligrams.

On December 11, 2007, the Commission added Amendment 706 to the list of amendments in § 1B1.10(c) which may be applied retroactively, effective March 3, 2008. U.S.S.G. App. C, Amend. 713. *Id.* Congress has delegated to the Sentencing Commission the sole authority to permit the retroactive application of a guideline reduction, and no court may alter an otherwise final sentence on the basis of such a retroactive guideline unless the Sentencing Commission expressly permits it. *See, e.g.*, *United States v. Perez*, 129 F.3d 255, 259 (2d Cir. 1997).

2. Standard of review

This Court has not yet established the appropriate standard of review for decisions on motions for relief under 18 U.S.C. § 3582(c)(2). *See Cortorreal*, 486 F.3d at 743. The denial of a motion for a reduction of sentence under § 3582(c)(2) has been held to be reviewed under an abuse of discretion standard, and a district court's interpretation of statutes or the Guidelines is reviewed *de novo*. *See United States v. Sharkey*, 2008 WL 4482893, *4

(10th Cir. Oct. 7, 2008); *see also United States v. Moore*, 541 F.3d 1323, 1326 (11th Cir. 2008); *United States v. Young*, 247 F.3d 1247, 1251 (D.C. Cir. 2001) (reviewing *de novo* a legal question presented by motion under § 3582(c)(2)). This is consistent with this Court's general approach to the review of sentencing decisions. *See United States v. Legros*, 529 F.3d 470, 474 (2d Cir. 2008) ("The abuse-of-discretion standard incorporates *de novo* review of questions of law (including interpretation of the Guidelines) and clear-error review of questions of fact.").

B. Discussion

Booker and its progeny do not render advisory the statutory requirement in § 3582(c)(2) that a district court must limit the extent of any sentence reduction to that which is consistent with the Guidelines. This is confirmed by this Court's prior decisions addressing the safety valve provision in 18 U.S.C. § 3553(f), which recognize that the Sixth Amendment does not prohibit Congress from mandating that courts must apply the Guidelines in the context of a sentence *reduction*. *See United States v. Holguin*, 436 F.3d 111, 115-17 (2d Cir.), *cert. denied*, 547 U.S. 1185 (2006).

1. Section 3582(c)(2) limits sentencing reductions based on retroactive guidelines to those authorized by the Sentencing Commission.

In 18 U.S.C. § 3582(c)(2), Congress created a "narrow exception to the rule that final judgments are not to be

modified." *United States v. Armstrong*, 347 F.3d 905, 909 (11th Cir. 2003) (quotation omitted). Section 3582(c)(2) permits a sentencing reduction based on a retroactive guideline only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." In the Sentencing Reform Act, Congress specifically delegated to the Sentencing Commission the authority to determine when, and to what extent, a sentencing reduction is allowed. Under 28 U.S.C. § 994(u), when the Commission amends the Guidelines, the Commission "shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u).

As the Supreme Court has explained, under this provision, "Congress has granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton v. United States*, 500 U.S. 344, 348 (1991) (citing § 994(u); emphasis omitted). Thus, under the express statutory language of § 3582(c)(2) and § 994(u), the Commission's policy statements that implement the statute's authorization of retroactive sentence reductions are binding, just as the statutory restrictions on reductions below a mandatory minimum are binding. *See United States v. Walsh*, 26 F.3d 75, 77 (8th Cir. 1994) ("Congress has made the policy statements set forth in § 1B1.10 the applicable law for determining whether a district court has the authority to reduce a sentence in this situation.").

2. The statute and policy statements prohibit a reduction below the floor set by the Sentencing Commission.

Section 3582(c)(2) does not provide for full resentencing of defendants. The Sentencing Commission made this clear in its recent revision to the policy statement governing sentencing reductions under § 3582(c)(2), specifically noting that proceedings under the statute "do not constitute a full resentencing of the defendant." U.S.S.G.§ 1B1.10(a)(3); *see United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000) (Section 3582(c)(2) "does not constitute a de novo resentencing") (citing *United States v. Cothran*, 106 F.3d 1560, 1562 (11th Cir. 1997)); *see also United States v. McBride*, 283 F.3d 612, 615 (3d Cir. 2002); *United States v. Jordan*, 162 F.3d 1, 4 (1st Cir. 1998); *United States v. Torres*, 99 F.3d 360, 361 (10th Cir. 1996).

Rather than authorizing a full reexamination of a defendant's sentence, the Sentencing Commission has placed explicit limits on the extent of a sentencing reduction permissible under § 3582(c)(2). Section 1B1.10(b)(1) directs that "[i]n determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court . . . shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected." U.S.S.G. § 1B1.10(b)(1). As noted above, § 1B1.10(b)(2) sets out

specific limits on the extent of sentencing reductions, providing that, with one exception not applicable here, "the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1)." U.S.S.G. § 1B1.10(b)(2)(A).[5]

Thus, the Commission, consistent with the authorization provided by Congress, has set a floor below which a reduced sentence may not fall. In short, 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10 are narrow provisions which permit a limited reduction of sentence, while prohibiting a complete reevaluation of the sentence. *See, e.g.*, *United States v. Hasan*, 245 F.3d 682, 685-86 (8th Cir. 2001) (en banc) (reduction below the amended guideline range is not permitted); *Bravo*, 203 F.3d at 781

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[5] The sole exception is set forth in § 1B1.10(b)(2)(B), which provides that if the defendant's "original term of imprisonment was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) may be appropriate." U.S.S.G. § 1B1.10(b)(2)(B); *see id*., app. note 3 (if defendant's original sentence was a downward departure of 20% below guideline range, reduction to term that is 20% below amended guideline range would be a "comparable reduction"). Section 1B1.10(b)(2)(B) further provides that if the defendant's original sentence "constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate."

(court was not permitted to "depart downward . . . to an extent greater than that authorized under Section 3582(c) based on the amended guideline provision").

Accordingly, as the court reasoned in *United States v. Julien*, 550 F. Supp. 2d 138 (D. Me. 2008), the governing statute, in providing that sentencing reductions must be "consistent with applicable policy statements issued by the Sentencing Commission," creates a jurisdictional bar on sentences which exceed the scope of the reductions authorized by the Commission. *Id*. at 139-40.

3. *Booker* did not affect the limits on sentencing reductions under section 3582(c)(2).

In *Booker*, the Supreme Court held that the Sixth Amendment, as construed by the Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), applied to the federal Sentencing Guidelines, under which the sentencing court rather than the jury found facts that established the mandatory Guidelines range. *Booker*, 543 U.S. at 230-45. The Court remedied that constitutional defect by severing the statutory provisions that made the Guidelines range mandatory, resulting in a regime in which the Guidelines are advisory, and courts are to consider the Guidelines and the other factors in 18 U.S.C. § 3553(a) in selecting an appropriate sentence. *Id*. at 245-68; *see Gall v. United States*, 128 S. Ct. 586, 594 (2007).

Booker had no direct effect on § 3582(c)(2). *Booker's* constitutional holding applied the now-familiar rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Booker*, 543 U.S. at 231 (quoting *Apprendi*, 530 U.S. at 490). That rule has no application to proceedings under § 3582(c)(2), which can only decrease – not increase – the defendant's sentence.

The remedial holding in *Booker* is likewise inapplicable. *Booker* applies to full sentencing hearings – whether in an initial sentencing or in a resentencing where the original sentence is vacated for error. The Court excised and severed the provision that made the Guidelines mandatory in those sentencings, 18 U.S.C. § 3553(b). It also excised the related provision on appellate review, 18 U.S.C. § 3742(e). "With these two sections excised (and statutory cross-references to the two sections consequently invalidated)," the Court held, "the remainder of the Act satisfies the Court's constitutional requirements." 543 U.S. at 259. Section 3582(c)(2) contains no cross-reference to § 3553(b) and therefore was not excised by *Booker*. Nor is there anything else in *Booker* that directly addresses § 3582 proceedings.

The *Booker* Court applied its advisory Guidelines remedy to cases in which no Sixth Amendment violation existed, concluding that Congress would not have wanted the Guidelines to be mandatory in some contexts and advisory in others. 543 U.S. at 266. The Court rested its conclusion on two observations, neither of which is

applicable to reduction proceedings under § 3582(c)(2). The first was that Congress would not have wanted to "impose mandatory . . . . limits upon a judge's ability to *reduce* sentences," but not to "impose those limits upon a judge's ability to *increase* sentences." *Id*. (emphasis in original); *see id*. (Congress would not have wanted such "one-way lever[s]"). But Congress clearly intended § 3582(c)(2) to be a "one-way lever" – it gives the court the option to leave a defendant's sentence alone or to reduce it, but does not permit the court to increase the sentence. Second, the Court observed that rendering the Guidelines partially advisory and partially mandatory in federal sentencings would engender significant "administrative complexities." *Id*. Given the limited scope of a proceeding under § 3582(c)(2), none of the significant "administrative complexities" is present that led the Supreme Court to require all Guideline provisions to be advisory at full sentencing proceedings. *Booker*, 543 U.S. at 266. To the contrary, holding that *Booker* requires full resentencings whenever a Guideline is made retroactive – in many cases years after the original sentencing – would create major administrative complexities and would vastly expand the intended scope of a sentencing reduction under § 3582(c)(2).

Section 3582(c)(2)'s direction that the court shall "conside[r] the factors set forth in section 3553(a) to the extent that they are applicable" also does not aid the defendant. Although one of the factors in § 3553(a) is the Guidelines range, and *Booker* made that range advisory, the still-valid statutory language in § 3582(c)(2) requires courts to consider the § 3553(a) factors (including the

Guidelines) when determining whether and by how much to reduce the sentence, "consistent with applicable policy statements issued by the Sentencing Commission." The Commission has made clear that courts are to consider the § 3553(a) factors in determining whether a reduction is warranted and "the extent of such reduction, but only *within the limits*" of § 1B1.10. U.S.S.G. § 1B1.10, app. note 1(B)(i) (emphasis added).

Nothing in the Supreme Court's recent decisions in *Gall* or *Kimbrough* affects this analysis. Both decisions reaffirmed *Booker*'s remedial holding that the Guidelines are advisory and that sentences are subject to appellate review for reasonableness, and both decisions proceeded to apply that remedial holding to the questions before them. *Kimbrough*, 128 S. Ct. at 564; *Gall*, 128 S. Ct. at 594-602. Because, as explained above, *Booker* does not apply to § 3582(c) proceedings, the applications of *Booker*'s remedial opinion in *Gall* and *Kimbrough* do not apply in such proceedings either.

4. This Court has held that the Sixth Amendment permits Congress to incorporate the Sentencing Guidelines into statutes that would reduce, rather than increase, a defendant's sentence.

The defendant's argument misunderstands the interplay between 18 U.S.C. § 3582(c)(2) and the Guidelines, including U.S.S.G. § 1B1.10, in light of recent Sixth Amendment jurisprudence. This Court's decisions recognize that the Sixth Amendment permits Congress to

incorporate Guidelines concepts by reference into statutes that authorize sentencing reductions.

In *United States v. Barrero*, 425 F.3d 154 (2d Cir. 2005), this Court rejected a defendant's argument that, in determining his eligibility for safety valve relief from an otherwise mandatory minimum sentence under 18 U.S.C. § 3553(f), the district court "should have considered the Guidelines advisory for purposes of calculating his criminal history points," and that "section 3553(f)(1) itself, by virtue of its reference to and incorporation of a Guidelines term (the defendant's 'criminal history points'), should be considered advisory post-*Booker*." *Id*. at 155. The Court disagreed with this assessment, noting first that "it conflicts with the plain terms of the statute." *Id*. at 157. According to the Court, the only basis for disregarding the mandate of § 3553(f)(1) would have been to avoid a Sixth Amendment violation, but the Court found no constitutional infirmity in that provision. As the Supreme Court had long held, a defendant has no Sixth Amendment right to jury factfinding regarding his prior convictions. *Id.* at 157-58. Accordingly, Congress could permissibly condition safety valve eligibility on a judicial determination that, as measured by the Guidelines, the defendant had no more than one criminal history point. *Id.*

The Court expanded upon *Barrero*'s holding in *United States v. Holguin*, 436 F.3d 111 (2d Cir.), *cert. denied*, 547 U.S. 1185 (2006), finding no Sixth Amendment violation when a district court makes factual findings under other Guidelines provisions – such as role in the offense – that disqualify the defendant for safety valve relief. *Id*. at 115-

17. In *Holguin*, the defendant had been sentenced to the mandatory minimum 60 months in prison for possession with intent to distribute 500 grams or more of cocaine. *Id*. at 113. Like Barrero, Holguin claimed that § 3553(f)'s mandate – that courts make certain Guidelines determinations as a prerequisite to safety valve eligibility – should be deemed advisory in the wake of *Booker*. *Id*. at 113-14. This Court quickly dispatched this argument:

> As to Holguin's argument concerning . . . § 3553(f)(1), we reiterate our holding in *United States v. Barrero*, 425 F.3d 154 (2d Cir. 2005), that Holguin's argument "conflicts with the plain terms of the statute" and cannot find support in the holding of *Booker*.

Id. at 116-17.

The *Holguin* Court then addressed a question that had been reserved in *Barrero* – namely, whether the Sixth Amendment permitted § 3553(f) to direct judicial factfinding on safety-valve eligibility criteria unrelated to the prior-conviction exception. The Court held that such factfinding was constitutional because it "does not permit a higher maximum to be imposed; the only effect of the judicial fact-finding is either to *reduce* a defendant's sentencing range or to leave the sentencing range alone, not to *increase* it." *Id.* at 117. Quoting the Government's brief with approval, the Court observed that Holguin's argument turned § 3553(f) on its head by "'converting the eligibility criteria for a sentence *reduction* into elements of the offense which *increase* his maximum sentence.'" *Id.*

Moreover, the Court agreed that this result was consistent with the Supreme Court's holding in *Harris v. United States*, 536 U.S. 545 (2002), that judicial factfinding is constitutional when used to set a minimum (rather than a maximum) sentence. *Holguin*, 436 F.3d at 118. "As the government argues, '[i]f judges may make findings that establish a sentencing floor, then *a fortiori* they may make findings that drop a defendant's sentence below that floor as with the safety valve.'" *Id.*; *see also United States v. Jiminez*, 451 F.3d 97, 103-04 (2d Cir. 2006) (per curiam) (upholding mandatory application of § 3553(f)(5), which requires defendant to provide truthful information to government to be eligible for safety valve).

The upshot of *Holguin* and *Barrero* is that Congress may require by statute that judges apply Guidelines concepts in a mandatory fashion, if they are used to determine whether a sentence reduction is appropriate. Section 3582(c)(2), like § 3553(f), offers the prospect of reducing a defendant's sentence rather than increasing the maximum sentence to which he is exposed. Accordingly, *Booker* does not undermine Congress's decision to incorporate Guidelines calculations as a mandatory matter into the eligibility calculus for § 3582(c)(2).

5. The Ninth Circuit's decision in *United States v. Hicks* is inconsistent with this Court's prior holdings addressing the Sixth Amendment and should not be followed.

The defendant ignores this Court's precedent set forth in *Barrero* and *Holguin*, relying instead on *United States*

v. Hicks, 472 F.3d 1167 (9th Cir. 2007), to support his argument that *Booker* requires a court to treat the Guidelines as advisory and engage in a full resentencing on a § 3582(c)(2) motion. App. Br. 11. There, the Ninth Circuit concluded that limiting the extent of a § 3582(c)(2) sentencing reduction to that prescribed by the Sentencing Commission amounts to a mandatory application of the Sentencing Guidelines that is prohibited by *Booker*.

For the reasons stated above, *Hicks*' analysis is flawed and should not be followed by this Court. *Hicks* fails to consider that the context of a § 3582(c)(2) proceeding, in which a court may only reduce a sentence or leave it undisturbed, is markedly different from the determinations under mandatory Guidelines which could increase a defendant's sentence – and thus run afoul of the Sixth Amendment – that were addressed in *Booker*. *Hicks* also fails to recognize that a sentencing reduction under § 3582(c)(2) is not a full resentencing proceeding, but a limited mechanism only for reducing a sentence to account for a retroactive Guideline amendment. Likewise, *Hicks* ignores the fact that § 3582(c)(2) incorporates into the statute the limits in § 1B1.10, and that those statutory limits are binding on sentencing courts. Perhaps more significant, *Hicks* did not have before it the revised text of and commentary to § 1B1.10, which now make clear the proper exercise of the Sentencing Commission's statutory authority to restrict the extent of sentencing reductions.

Even more important, to the extent that *Hicks* may be read to suggest that Congress may not constitutionally require the mandatory application of Guidelines concepts

in any context, even when determining eligibility for a sentence reduction, that notion is squarely foreclosed in this Circuit by *Barrero, Holguin*, and *Jiminez*.[6]

A decision of the Third Circuit is persuasive. In *United States v. Wise*, 515 F.3d 207 (3d Cir. 2008), defendants argued that they could gain relief under the crack amendments immediately, even though the Sentencing Commission in Amendment 713 provided that the crack amendments would not become listed in § 1B1.10(c) as retroactive until Amendment 713's effective date of March 3, 2008. The Third Circuit ruled that defendants could not

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[6] For the same reasons, *United States v. Forty Estremera*, 498 F. Supp. 2d 468, 471-72 (D. P.R. 2007), another case relied on by the defendant, App. Br. at 12, is unavailing on this point. The defendant also cites dicta from *United States v. Polanco*, 2008 WL 144825 (S.D.N.Y., Jan. 15, 2008). App. Br. at 11. But this case is of no moment here because the court did not reach the issue of whether *Booker* applies to a § 3582 motion for reduction in sentence, holding that a decision on that issue was unnecessary. *Id*. at *2-3. Because it neither addressed nor resolved the arguments raised by this issue, the *Polanco* decision is not at all persuasive authority on this point. *See United States v. Robinson*, 2008 WL 2578043 (W.D. Pa. June 26, 2008) (identifying the relevant portion of *Polanco* as dicta, and rejecting the analysis in the Ninth Circuit's decision in *Hicks*). Likewise, the defendant's citations to *United States v. Mihm*, 134 F.3d 1353 (8th Cir. 1998), and *Settembrino v. United States*, 125 F. Supp. 2d 511 (S.D. Fla. 2000), also are unavailing. App. Br. at 12. These cases – both of which were decided before *Booker* – do not discuss, much less support, the argument that *Booker* applies to a § 3582(c)(2) motion.

obtain immediate relief under § 3582(c)(2) because § 1B1.10(c) did not yet list the crack amendments. *Id*. at 220-21. The Court wrote:

> Some may argue that, because the Guidelines are no longer mandatory, defendants need not wait to apply for relief under § 3582(c)(2). That fundamentally misunderstands the limits of *Booker*. Nothing in that decision purported to obviate the congressional directive on whether a sentence could be reduced based on subsequent changes in the Guidelines. As we have stated before, "[t]he language of the applicable sections could not be clearer: the statute directs the Court to the policy statement, and the policy statement provides that an amendment not listed in subsection (c) may not be applied retroactively pursuant to 18 U.S.C. § 3582(c)(2)." *United States v. Thompson*, 70 F.3d 279, 281 (3d Cir.1995).

Id. at 221 n.11; *see id*. at 220 ("The Guidelines are no longer mandatory, but that does not render optional" statutory directives).

Under this persuasive reasoning, and under the plain language of § 3582(c)(2), the Sentencing Commission's determinations regarding whether and to what extent a sentence may be reduced must be respected. *See United States v. Speights*, 561 F. Supp. 2d 1277, 1281 (S.D. Ala. 2008) (noting in part that *Hicks* "has been roundly criticized in many quarters," and "is overwhelmed by a plethora of persuasive federal decisions from throughout

the country in the last few months emphatically overruling *Booker* objections of the kind advanced by [the defendant] here.").

Although the Second Circuit has not yet ruled on this issue in the context of a § 3582(c)(2) motion, in the months since the Sentencing Commission amended § 1B1.10, only a few courts have followed *Hicks. See United States v. Ragland*, 568 F. Supp. 2d 19 (D.D.C. 2008); *United States v. Shelby*, 2008 WL 2622828 (N.D. Ill. June 30, 2008); *see also United States v. Stokes*, 2008 WL 938919 (M.D. Fla. Apr. 7, 2008); *United States v. Barrett*, 2008 WL 938926 (M.D. Fla. Apr. 7, 2008).

Instead, an overwhelming majority of courts have rejected *Hicks* and found *Booker* inapplicable to application of a retroactive guideline amendment. *See, e.g.*, *United States v. Outlaw*, 281 Fed. Appx. 220 (4th Cir. 2008) (unpublished); *United States v. Herrera*, 2008 WL 4060168 (10th Cir. Sept. 3, 2008) (unpublished); *United States v. Atwell*, 2008 WL 3272016 (M.D. Fla. Aug. 4, 2008); *United States v. Atwell*, 2008 WL 4194829 (M.D. Fla. Sept. 10, 2008) (rejecting argument that § 1B1.10 represents an unconstitutional delegation of authority to the Sentencing Commission); *United States v. Kahlmorgan*, 2008 WL 1776894, *3 (M.D. Fla. Apr. 17, 2008); *United States v. Thomas*, 566 F. Supp. 2d 830, 831-32 (N.D. Ill. 2008); *United States v. Hopkins*, 2008 WL 504002 (N.D. Iowa Feb. 21, 2008); *United States v. Heard*, 2008 WL 4108449 (W.D. La. Sept. 3, 2008); *Julien*, 550 F. Supp. 2d at 139-40; *United States v. Blair*, 2008 WL 2622962 (E.D. Mich. July 2, 2008); *United*

States v. Hudson, 2008 WL 4164106 (E.D.N.Y. Sept. 5, 2008); *United States v. Osuna*, 2008 WL 1836943, *2-3 (E.D.N.Y. Apr. 22, 2008); *United States v. Cruz*, 560 F. Supp. 2d 198, 201-203 (E.D.N.Y. 2008); *United States v. Jimenez*, 2008 WL 2774450 (S.D.N.Y. July 16, 2008); *United States v. Diggins*, 2008 WL 4054413 (S.D.N.Y. Aug. 27, 2008); *United States v. Gentry*, 2008 WL 4442948 (E.D. Pa. Sept. 30, 2008); *United States v. Doe*, 2008 WL 4276327 (E.D. Pa. Sept. 15, 2008); *United States v. Roman*, 2008 WL 2669769 (E.D. Pa. July 7, 2008); *United States v. Wright*, 2008 WL 2265272 (E.D. Pa. June 3, 2008); *United States v. Rivera*, 535 F. Supp. 2d 527, 530-31 (E.D. Pa. 2008); *United States v. Austin*, 2008 WL 2412949 (M.D. Pa. June 11, 2008); *United States v. Havelka*, 2008 WL 2687099 (W.D. Pa. July 8, 2008); *United States v. Robinson*, 2008 WL 2578043 (W.D. Pa. June 26, 2008); *United States v. Strothers*, 2008 WL 2473686 (W.D. Pa. June 19, 2008); *United States v. Finney*, 2008 WL 2435559 (W.D. Pa. June 16, 2008); *United States v. Johnson*, 556 F. Supp. 2d 563, 568-69 (W.D. Va. 2008); *United States v. Boyce*, 2008 WL 2725091 (S.D. W. Va. July 11, 2008).[7]

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[7] This Court mentioned § 3582(c)(2) in *Regalado*, but its discussion of that section was dicta, as the Court was considering a direct appeal, not a motion under § 3582(c)(2). *See Regalado*, 518 F.3d at 150-51; *see also United States v. Tucker*, 2008 WL 2704543 *3-4, n.5 (M.D. Pa. July 8, 2008) (rejecting Ninth Circuit's decision in *Hicks* and noting that the defendant's reliance on, among other cases, *Regalado*, was misplaced because it dealt with a direct appeal, not a motion under § 3582(c)(2)).

The conclusion that *Booker* does not apply in proceedings under § 3582(c)(2) is also consistent with the holding of this Court (and other courts) that defendants whose convictions are final have no right to resentencing under *Booker* on collateral review under 28 U.S.C. § 2255. *See Guzman v. United States*, 404 F.3d 139, 141-44 (2d Cir. 2005); *Cirilo-Muñoz v. United States*, 404 F.3d 527, 532-33 (1st Cir. 2005); *Lloyd v. United States*, 407 F.3d 608, 613-16 (3rd Cir. 2005); *United States v. Morris*, 429 F.3d 65, 69-72 (4th Cir. 2005); *United States v. Gentry*, 432 F.3d 600 (5th Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 860-63 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005); *Never Misses A Shot v. United States*, 413 F.3d 781, 783-84 (8th Cir. 2005); *United States v. Cruz*, 423 F.3d 1119 (9th Cir. 2005) (per curiam); *United States v. Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005); *Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir. 2005); *In re Fashina*, 486 F.3d 1300, 1306 (D.C. Cir. 2007). It would be incongruous if courts interpreted the congressional scheme in § 3582(c)(2), which provides for much more limited relief than § 2255, concerns only sentence reductions, and raises no Sixth Amendment concerns, as triggering a full *Booker* resentencing.

Indeed, given that *Booker* does not apply to the many defendants whose sentences were final when *Booker* was decided, it would be unfair to apply *Booker* to that subset of those defendants whose sentences are being lowered under Amendment 706. Section 3582(c)(2) was designed only to permit courts to reduce defendants' sentences to account for a retroactive Guideline amendment. To grant

these defendants a further reduction that is not afforded to all other similarly situated defendants would produce the unwarranted sentencing disparities Congress sought to eliminate in the Sentencing Reform Act. It would also entail enormous additional cost and effort in resentencing tens of thousands of inmates, even though § 3582(c)(2) by its terms does not authorize a full resentencing.

Moreover, if the Court were to hold that *Booker* applies in these circumstances, then the rule that courts lack jurisdiction to modify a final sentence would effectively be swallowed by what was intended to be the narrow exception in § 3582(c)(2). There is simply no question that the Sentencing Commission has the sole authority, pursuant to sections 994 and 3582(c), to declare an amendment retroactive. *See Cortorreal*, 486 F.3d at 744; *Perez*, 129 F.3d at 259. But if § 1B1.10 is advisory, then so is the Sentencing Commission's decision to include an amendment in the list in that section of retroactive provisions. If that were the case, then each district court would be left to decide for itself whether to apply any, all, or none of the amendments in the Guidelines retroactively. This would result in § 3582(c)(2)'s limited authority to modify a final sentence being invoked – or not – in an utterly haphazard fashion with few, if any, real limits. Surely this was not Congress's intent, nor is it by any means a logical outgrowth of the Supreme Court's holding in *Booker*.

There is nothing about the binding nature of the Commission's authority to determine when sentences may be *reduced* or to what extent they may be *reduced* that

violates the Sixth Amendment concerns behind the *Booker* decision. Thus, because the grant of authority to the Commission is constitutional, the Commission's clear limitation must be enforced. *See Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (Congress may constitutionally delegate its authority to the Sentencing Commission to establish guidelines for sentencing); *Barrero*, 425 F.3d at 158 ("Because 18 U.S.C. § 3553(f)(1) is constitutional, we may not ignore its dictates, as the defendant urges us to do.").

Accordingly, the district court was correct in concluding that it was not authorized to conduct a full resentencing under § 3582(c)(2).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

PAUL A. MURPHY
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,176 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

PAUL A. MURPHY
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 3582. Imposition of a sentence of imprisonment

* * *

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the

community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

U.S.S.G. § 1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.--

(1) In General.--In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. 3582(c)(2). As required by 18 U.S.C. 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.--A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. 3582(c)(2) if--

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.--Consistent with subsection (b), proceedings under 18 U.S.C. 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.--

(1) In General.--In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitations and Prohibition on Extent of Reduction.--

(A) In General.– Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C.

3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) Exception.--If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

(C) Prohibition.--In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Covered Amendments.--Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454,

461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715.

28 U.S.C. § 994. Duties of the Commission

* * *

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for --

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy

statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar

records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received

> in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.